Lassiter v. Department of Social Services: What It Means for the Indigent Divorce Litigant

I. INTRODUCTION

The validity of a divorce[1] decree or a judgment denying divorce can be challenged on the grounds that a matrimonial litigant has a constitutional right to counsel. In *Lassiter v. Department of Social Services*[2] the United States Supreme Court outlined a limited right to appointed counsel in civil cases affecting fundamental individual interests. In *Lassiter* an indigent mother faced the State's attempt to terminate her parental rights. The Court noted that in some parental termination cases, although not in petitioner's, failure by a state to provide counsel constitutes a violation of the due process clause of the United States Constitution.[3]

The *Lassiter* Court laid out the test that determines the necessity of counsel in those cases that do not concern a possible loss of physical liberty. The test balances three elements against each other: the private interest at stake in the proceeding, the relevant state interests, and the risk that lack of counsel would result in erroneous determinations.[4] The net weight of these elements is measured against a presumption that counsel is constitutionally required only when the indigent litigant's physical liberty is jeopardized.[5] The Court held that the facts of *Lassiter* did not overcome the presumption against counsel, but indicated that other parental termination cases might necessitate provision of counsel.[6]

A divorce decree, like a termination of parental rights, affects a fundamental individual interest.[7] When a fundamental interest is at stake, courts afford it more protection than other interests that arise in some other civil cases, such as economic interests.[8] Because of the importance of an individual's interest in his or her marriage, an indigent divorce litigant may have a constitutional right to counsel under the *Lassiter* analysis. This Case Comment first will consider *Lassiter* in greater detail. It then will investigate both the presumption against counsel and the elements of the *Lassiter* test as applied to divorce. Finally, this Case Comment will focus on arguments useful in determining which divorce cases constitutionally require counsel to be provided to indigent litigants under the *Lassiter* test.

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1. "Divorce" will be used in this Case Comment to refer to all methods of terminating a marriage, including annulment and dissolution. Either the granting or denial of a divorce can be unjust if both parties are not represented by counsel. *See infra* text accompanying notes 95–103.

2. 452 U.S. 18 (1981).

3. *Id.* at 31–32. U.S. CONST. amend. XIV, § 1, states that "[n]o State shall . . . deprive any person of life, liberty or property, without due process of law . . . ."

4. 452 U.S. 18, 27 (1981).

5. *Id.* at 26–27.

6. *See infra* text accompanying notes 33–37.

7. *See infra* text accompanying notes 67–94.

8. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976).

II. *LASSITER v. DEPARTMENT OF SOCIAL SERVICES*

On August 31, 1978, Abby Gail Lassiter was stripped of her status as parent of her natural son, William L. Lassiter. Although Ms. Lassiter was imprisoned on a murder conviction at the time of the hearing, she appeared *pro se* in her defense. The trial court terminated her parental rights after finding that she willfully failed to maintain concern or responsibility for her son and that termination would be in the best interests of the minor.[9]

Ms. Lassiter appealed this ruling to the United States Supreme Court, which granted certiorari.[10] She argued that North Carolina's failure to appoint counsel for her violated the constitutional standards of due process of law.[11] The Supreme Court used a balancing test to decide that Ms. Lassiter's case was not constitutionally defective.[12] The net weight of the three interests considered—Ms. Lassiter's interest in the termination proceeding, the risk of erroneous determination, and North Carolina's interest in the case—did not outweigh the presumption against counsel. The Court stated, however, that if *Lassiter* had been an appropriate case, "[I]t could not be said that the . . . [elements in the balance of interests] did not overcome the presumption against the right to appointed counsel . . . ."[13] Future trial courts have to determine when counsel is required by applying the *Lassiter* test on a case-by-case basis.[14]

The tripartite balancing test used by the *Lassiter* Court originated in *Mathews v. Eldridge*.[15] In *Eldridge* the Social Security Administration terminated plaintiff's disability benefits after an investigation had led the Administration to conclude that plaintiff no longer was disabled. Plaintiff claimed that due process entitled him to an evidentiary hearing on the matter.[16] The Court applied a balancing test and found that this protection was not constitutionally required.[17] The Court noted that the balancing test identifies the "specific dictates of due process"[18] and, therefore, is applicable to requests for other procedural safeguards.[19] Even though a majority of the Court in *Lassiter* extended the *Eldridge* balancing test to requests for appointed counsel in termination proceedings, by adding the presumption against counsel it made a favorable outcome for the indigent parent less likely.[20]

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9. 452 U.S. 18, 24 (1981).

10. 449 U.S. 819 (1980).

11. 452 U.S. 18, 24 (1981).

12. *Id.* at 33. *Lassiter* was a 5–4 decision. Justice Stewart authored the majority opinion, joined by Chief Justice Burger (who also filed a brief concurrence) and Justices White, Rehnquist, and Powell. Justice Blackmun dissented in an opinion joined by Justices Brennan and Marshall, while Justice Stevens dissented separately.

13. *Id.* at 31.

14. *Id.* at 31–32.

15. 424 U.S. 319 (1976).

16. *Id.* at 325.

17. *Id.* at 349.

18. *Id.* at 335.

19. *See* Little v. Streater, 452 U.S. 1 (1981). In *Little*, decided the same day as *Lassiter*, the Court used the *Eldridge* test to hold that an indigent paternity suit defendant must be provided free blood typing.

20. *See infra* text accompanying note 47.

Before *Lassiter* the Court had not explicitly applied the presumption against counsel. The majority opinion in *Lassiter* surveyed primarily criminal prosecution cases in the counsel area.[21] The Court concluded that a "preeminent generalization" could be made about these decisions: the right to counsel had been recognized only if the proceeding in question had placed the individual's physical liberty in danger.[22] The Court did not declare this "generalization" a rule of law, but concluded that the precedents gave rise to a presumption that to comply with due process a state need not provide counsel except in situations threatening physical liberty.[23] The Court never before had stated that the "generalization" ripened into a presumption, a presumption that played a key role in the holding of *Lassiter*.

The Supreme Court applied the *Eldridge* test to the facts of *Lassiter* to decide whether an absolute right to counsel arises from the nature of parental termination hearings.[24] First, the majority recognized the importance of a parent's interest in his or her child.[25] The Court then declared that because North Carolina sought to deprive petitioner of this interest, she had a "commanding" interest in assuring an accurate outcome in the termination proceeding.[26] The Court noted further that because of the state's concern for the welfare of the child it shares the parent's interest in a just determination.[27]

The *Lassiter* Court also examined the primary interest advanced by North Carolina to justify the withholding of counsel—increased cost to the state. The majority characterized the state's fiscal interest as "relatively weak" in parental termination hearings. Justice Stewart argued that it was "hardly significant enough to overcome private interests as important as those here . . . ."[28] The Court also identified another state interest promoted by the withholding of counsel—encouragement of informal proceedings.[29]

Finally, the Court applied the third element in the *Eldridge* balancing test, the risk that absent counsel the proceeding at issue might result in an erroneous outcome, to the facts of *Lassiter*. The Court examined North Carolina's termination procedure to determine whether it adequately protected each party's interest in an accurate determination.[30] The majority observed that the procedures and issues inherent in the termination hearing were often commonplace.[31] Nonetheless, the Court noted that the typical defendant, one with little education, might fail to understand the ultimate issues in the

21. 452 U.S. 18, 25–26 (1981). The Court principally examined Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972); *In re* Gault, 387 U.S. 1 (1967); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972); Scott v. Illinois, 440 U.S. 367 (1979).

22. 452 U.S. 18, 25 (1981).

23. *Id.* at 26–27.

24. *Id.* at 27–31.

25. *Id.* at 27.

26. *Id.*

27. *Id.*

28. *Id.* at 28. The presumption against counsel, however, had the effect of giving greater weight to the state interests served by the withholding of counsel.

29. *Id.* at 31.

30. *Id.* at 28–29.

31. *Id.* at 30.

hearing; the uncounseled parent also might be overwhelmed by the combination of the formal courtroom environment and the usage of unfamiliar legal procedures.[32]

After applying each of the *Eldridge* elements to the facts in *Lassiter*, the Court weighed its net findings against the presumption against counsel. The Court stated that the presumption would be overcome and a lack of due process found in cases in which "the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak."[33] Not all termination hearings, however, display a similar distribution of the *Eldridge* elements. Thus, the Court held that the presence of the right to counsel is to be determined by application of the *Lassiter* test on a case-by-case basis at the trial level.[34]

After the majority's rejection of an absolute right to counsel in parental termination hearings, it proceeded to the second step in its analysis. Utilizing the case-by-case approach, the Court questioned whether Abby Gail Lassiter's case was one in which the *Eldridge* elements outweighed the presumption against counsel. The Court observed that Ms. Lassiter's interest in the proceeding was weakened because the petition to terminate her parental rights contained no allegations that later could result in criminal liability.[35]

The Court then considered the risk that Ms. Lassiter would be erroneously deprived of her son because she had not been represented by counsel. The majority enumerated a number of circumstances supporting its conclusion that the result of the hearing had been proper despite the absence of counsel. The hearing presented no difficult points of procedural or substantive law, and no expert witnesses testified. Although Ms. Lassiter asserted in her argument that her mother could assume custody of her son, other evidence indicated that the mother would be unable to do so.[36] Furthermore, Ms. Lassiter was a convicted murderer who showed little concern for either her child or the hearing. The Court concluded that "the weight of the evidence that she had few sparks of such interest was sufficiently great that the presence of counsel for Ms. Lassiter could not have made a determinative difference."[37] Thus, Ms. Lassiter's claim to a right to appointed counsel failed to withstand scrutiny under the second step of the *Lassiter* analysis because the likelihood that the trial court's ruling was erroneous was outweighed by these other interests.

In his dissent Justice Blackmun, joined by Justices Brennan and Marshall, employed the *Eldridge* test without using the majority's presumption and reached an opposite result.[38] Justice Blackmun did not agree with the

32. *Id.*
33. *Id.* at 31.
34. *Id.* at 31, 32; *see* Gagnon v. Scarpelli, 411 U.S. 778 (1973).
35. 452 U.S. 18, 32 (1981).
36. *Id.* at 33.
37. *Id.* at 32–33.
38. *Id.* at 35 (Blackmun, J., dissenting).

majority's "generalization" that previous decisions supported a presumption against counsel absent a threat to physical liberty.[39] Justice Stevens, in a separate dissent, deemed a balancing approach inapplicable to cases concerning a fundamental individual interest.[40] He argued that fairness requires provision of counsel whenever deprivation of a fundamental right is threatened.[41]

A number of state courts have considered either the *Lassiter* situation or similar proceedings, such as child neglect hearings. These courts generally find that counsel is constitutionally mandated.[42] In *State ex rel. Heller v. Miller*,[43] for example, the Ohio Supreme Court held that an indigent parent has the constitutional right to counsel in an appeal of a termination proceeding. The *Heller* court based its holding on "the existence of a fundamental interest in equal treatment in appeals from judgments affecting one's liberty."[44] The parent-child relationship is a fundamental liberty interest that merits equal treatment in appeals.[45]

III. EXTENDING THE *LASSITER* ANALYSIS

A. *The Presumption*

Perhaps the most striking feature of the *Lassiter* decision is the Court's announcement that it would apply a presumption that states need furnish counsel to an indigent litigant only in proceedings endangering physical liberty.[46] The Court distilled the presumption against counsel from its earlier right to counsel cases and incorporated it into the *Eldridge* analysis. Although the inclusion of a presumption might have radically changed the *Eldridge* analysis, the only effect of the Court's application of the presumption was a shift in the *Eldridge* balance: circumstances must weigh more heavily in favor

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39. *Id.* at 40 (Blackmun, J., dissenting).

40. *Id.* at 59 (Stevens, J., dissenting).

41. *Id.* at 59–60 (Stevens, J., dissenting).

42. *See* Danforth v. State Dep't of Health and Welfare, 303 A.2d 794 (Me. 1973) (removal from parental custody); Department of Pub. Welfare v. J.K.B., 393 N.E.2d 406 (Mass. 1979) (adoption without parental consent); Reist v. Bay Circuit Judge, 396 Mich. 326, 241 N.W.2d 55 (1976) (termination of parental rights); State v. Caha, 190 Neb. 347, 208 N.W.2d 259 (1973) (termination of parental rights); Crist v. Division of Youth and Family Servs., 128 N.J. Super. 402, 320 A.2d 203 (Super. Ct. Law Div. 1974) (dependency), *modified*, 135 N.J. Super. 573, 343 A.2d 815 (Super. Ct. App. Div. 1975); *In re* Ella B., 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972) (neglect); State *ex rel.* Heller v. Miller, 61 Ohio St. 2d 6, 399 N.E.2d 66 (1980) (termination of parental rights); *In re* Chad S., 580 P.2d 983 (Okla. 1978) (termination of parental rights); *In re* Adoption of R.I., 455 Pa. 29, 312 A.2d 601 (1973) (termination of parental rights); *In re* Myricks, 85 Wash. 2d 252, 533 P.2d 841 (1975) (dependency and neglect); State *ex rel.* LeMaster v. Oakley, 203 S.E.2d 140 (W.Va. 1974) (neglect). *See also* Davis v. Page, 640 F.2d 599 (5th Cir. 1981) (dependency); Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974) (dependency, counsel to be provided on case-by-case basis); Smith v. Edmiston, 431 F. Supp. 941 (W.D. Tenn. 1977) (dependency and neglect). These cases generally hold that denial of counsel violates the due process clauses of both state and federal constitutions.

43. 61 Ohio St. 2d 6, 399 N.E.2d 66 (1980).

44. *Id.* at 12, 399 N.E.2d at 69. The litigant's right to treatment in an appellate review equal to that in a trial court was derived from Griffin v. Illinois, 351 U.S. 12 (1956), and Douglas v. California, 372 U.S. 353 (1963).

45. 61 Ohio St. 2d 6, 13, 399 N.E.2d 66, 70 (1980). The court cited Moore v. City of East Cleveland, 431 U.S. 494 (1977), and Stanley v. Illinois, 405 U.S. 645 (1972), as establishing the fundamental and nature of the interest.

46. 452 U.S. 18, 26–27 (1981).

of the litigant requesting counsel than would be necessary if another procedural safeguard were at issue.[47]

Examination of prior Supreme Court right to counsel decisions is useful in understanding the genesis of the presumption against counsel. In the landmark case of *Gideon v. Wainwright*[48] the Court held that a felony defendant had the constitutional right to appointed counsel. The *Gideon* Court based an absolute right to counsel for felony defendants on sixth amendment and fifth amendment due process standards. The Court emphasized the Anglo-American tradition of fair trials and the unfairness of trying an uncounseled defendant.[49]

In two subsequent decisions the Court extended the *Gideon* right to counsel: in *Argersinger v. Hamlin*[50] the Court extended the right to misdemeanor defendants facing incarceration and in *In re Gault*[51] the right was extended to minors in "civil" delinquency hearings. Thus, the right to counsel clearly is not dependent upon a state characterization of a proceeding as "criminal." In *Argersinger* the Court held that even brief incarceration is a sufficient deprivation of liberty to require provision of counsel.[52] The *Gault* Court observed that the minor faced institutionalization until age twenty-one[53] and held that counsel was necessary to protect against an unjust deprivation of the minor's physical liberty.[54]

In both cases discussed above the threat of imprisonment or its equivalent was an important factor that influenced the Court's extension of a right to counsel. *Scott v. Illinois*,[55] a criminal case in which the Court refused to require counsel for a defendant who had not been sentenced to prison, brought the centrality of the interest in physical liberty into clear focus.[56] The Court called deprivation of physical liberty "different in kind" from other punishments such as "fines or the mere threat of imprisonment."[57] This view clearly underlies the *Lassiter* presumption.

In his dissent in *Lassiter* Justice Blackmun agreed that the *Eldridge* test was applicable to parental termination cases but argued vigorously against the use of the presumption established by the majority.[58] He asserted that the

47. See, *e.g.*, Little v. Streater, 452 U.S. 1 (1981), in which the Court applied only the *Eldridge* test to a request for a noncounsel procedural safeguard (blood typing in a paternity suit). *Little* indicates that the *Lassiter* presumption is inapplicable to cases in which the right to counsel is not at issue.

48. 372 U.S. 335 (1963).

49. *Id.* at 342–45. *See also infra* note 128.

50. 407 U.S. 25 (1972).

51. 387 U.S. 1 (1967).

52. The *Argersinger* Court phrased the rule as follows: "[N]o imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel." 407 U.S. 25, 40 (1972). Thus, an accused misdemeanant may be tried and convicted without counsel, but may not be sentenced to any time in prison unless representation is furnished.

53. 387 U.S. 1, 41 (1967).

54. *Id.*; *see also* Gagnon v. Scarpelli, 411 U.S. 778 (1973) (right to counsel in parole revocation hearing).

55. 440 U.S. 367 (1979).

56. The Court limited its holding in *Scott* to cases in which the defendant actually is sentenced to prison, rather than those in which a prison sentence is merely a possibility.

57. 440 U.S. 367, 373 (1979). The *Lassiter* Court quoted this language at 452 U.S. 18, 26 (1981).

58. 452 U.S. 18, 42 (1981) (Blackmun, J., dissenting).

presumption was not warranted by precedent and noted that previous decisions addressing the right to counsel had turned on the importance of the individual interest and the extent to which the state had sought to curtail that interest.[59] Justice Blackmun argued further that the presumption destroyed the flexibility of due process, which should emphasize "attentiveness to the particular context."[60] He also castigated the majority for adopting a case-by-case approach, urging that due process analysis should center on "consideration of different decisionmaking *contexts*, not of different *litigants* within a given context."[61] Blackmun concluded that under the *Eldridge* analysis, without the presumption, parental termination cases warrant provision of counsel.[62]

Under the majority approach presence of counsel is typically a constitutional requirement in proceedings that may result in deprivation of physical liberty.[63] Loss of physical liberty may result indirectly from a divorce decree. For example, a conviction for contempt of court for failure to pay child support[64] or postdivorce charges, such as bigamy,[65] can lead to incarceration. Even though the indigent defendant would be provided counsel in the criminal prosecution, the divorce court's adverse findings on crucial issues would be damaging to the defendant's case. Nonetheless, because divorce litigation only indirectly threatens the parties with imprisonment, indigents asserting the right to counsel must overcome the *Lassiter* presumption. A petitioner must present facts sufficient to rebut the presumption on two levels. He or she must argue that divorce litigants in general have an absolute right to counsel and that under the *Lassiter* case-by-case approach petitioner's own case also requires counsel.

B. *The Balancing Factors*

The *Lassiter* Court held that the tripartite *Eldridge* balancing test[66] could be used to rebut the presumption against counsel. Although the Court would presume in a divorce context that counsel for an indigent divorce litigant need not be furnished to comply with due process, the litigant could overcome this obstacle by demonstrating that the balancing elements weigh in favor of providing counsel. The *Lassiter* analysis requires this balancing to be performed at two levels: a court first should consider divorce litigants as a class and then it should review the petitioner's particular case. The following sections of this Case Comment will examine each of the three branches of the balancing test as applied to the divorce litigant.

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59. *Id.* at 40 (Blackmun, J., dissenting).
60. *Id.* at 41 (Blackmun, J., dissenting).
61. *Id.* at 49 (Blackmun, J., dissenting) (emphasis in original).
62. *Id.* at 42 (Blackmun, J., dissenting).
63. *See supra* text accompanying notes 48–57.
64. *See, e.g.*, N.J. STAT. ANN. § 24:4-30.15(c) (West 1952); OHIO REV. CODE ANN. § 2919.21 (Page 1982); TENN. CODE ANN. § 39-210 (1975).
65. *See, e.g.*, CAL. PENAL CODE § 283 (Supp. 1982); IND. CODE § 35-46-1-2 (1979); OHIO REV. CODE ANN. § 2919.01 (Page 1982).
66. *See supra* text accompanying notes 15–19.

1. *The Individual Interest*

Under the *Lassiter* analysis the key to finding a right to counsel in a particular proceeding is the importance of the individual interest at stake. A relatively trivial interest will not outweigh the state's interest in limiting public expenditures for the provision of counsel.[67] The more important the individual interest, the more probable that the balance will tip in favor of the indigent litigant. The *Lassiter* Court recognized that a parent-child relationship is a fundamental individual interest[68] deserving of constitutional protection.[69] Success in obtaining reversal of a divorce decree entered without representation of counsel will turn in large measure upon the litigant's ability to convince a reviewing court that the marital relationship is as fundamental as the individual interest in *Lassiter*.

On several occasions the Supreme Court has accorded constitutional significance to matrimonial interests. As early as 1923 the court recognized that the liberty interests protected by due process included "the right of the individual . . . to marry . . . ."[70] Later in *Skinner v. Oklahoma*[71] the Court invalidated a statute authorizing sterilization of twice-convicted felons. The Court gave the legislation more exacting scrutiny because it touched upon "one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[72]

In *Griswold v. Connecticut*[73] the Court, by emphasizing matrimonial interests, recognized that a right of privacy exists in intimate associations. At issue in *Griswold* was a law banning the use of contraceptives by anyone, including married persons. The Court overturned the statute, explaining that the marital bedroom is within a zone of privacy that emanates from several constitutional guarantees.[74] Two years later in *Loving v. Virginia*[75] the Court struck down an antimiscegenation statute on equal protection and due process grounds. The *Loving* opinion uses strong language to emphasize that the fundamental nature of matrimonial interests commands heightened constitutional protection.[76]

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67. *See infra* note 115 and accompanying text.

68. 452 U.S. 18, 27 (1981).

69. Numerous cases considered by the Court have contained various parent-child issues. *See, e.g.*, Smith v. Organization of Foster Families, 431 U.S. 816 (1977) (removal of children from foster home); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (zoning ordinance preventing certain family members from living together); Stanley v. Illinois, 405 U.S. 645 (1972) (removal of children from custody of unwed father); Prince v. Massachusetts, 321 U.S. 158 (1944) (child prevented from distributing magazines in furtherance of family religion); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (mandatory public education); Meyer v. Nebraska, 262 U.S. 390 (1923) (prohibition of foreign language instruction to young children).

70. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

71. 316 U.S. 535 (1942).

72. *Id.* at 541.

73. 381 U.S. 479 (1965).

74. *Id.* at 485.

75. 388 U.S. 1 (1967).

76. The Court stated that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Id.* at 12.

While the decisions noted above establish the constitutional importance of facilitating the marriage relationship, they do not speak to an individual's interest in terminating his marriage. *Boddie v. Connecticut*[77] presented the Court with an opportunity to consider a litigant's right of access to the courts in a divorce proceeding. The plaintiffs in *Boddie* were indigent divorce litigants who were denied court access because they could not afford filing fees.[78] The litigants claimed that this denial of access violated their constitutional rights. Noting the constitutionally protected nature of the marriage relationship,[79] the Court concluded that individuals seeking to terminate a marriage by the only permissible method[80] must be given a "meaningful opportunity to be heard."[81] The majority opinion observed that the bar imposed by the filing fees impinged on the fundamental interest in marriage in two ways: (1) it forced the applicants to remain married and (2) it prevented them from entering into another marriage.[82]

A pair of post-*Boddie* holdings, *United States v. Kras*[83] and *Ortwein v. Schwab*,[84] emphasized the importance of the fundamental interest in marriage to the outcome in *Boddie*. Although both cases concerned court filing fees similar to those in *Boddie*, the indigent parties sought to litigate matters other than divorce. In *Kras* the petitioner was denied access to the bankruptcy court;[85] in *Ortwein* the petitioner desired judicial review of administrative action terminating welfare benefits.[86] The Court held that *Kras* and *Ortwein* did not represent violations of due process.[87] In both cases the Court distinguished *Boddie*, in part by arguing that the interests in bankruptcy and welfare are not as fundamental as the interest in marriage and family life.[88]

The *Boddie* due process standard of "meaningful opportunity to be heard" remains valid for requests for various procedural safeguards in cases touching on fundamental interests.[89] Arguably, both denial of access to the court and denial of counsel to a divorce litigant preclude a meaningful oppor-

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77. 401 U.S. 371 (1971).

78. *Id.* at 372.

79. *Id.* at 376.

80. Divorce is a creature of statute and thus is within the control of the legislature. People *ex rel.* Doty v. Connell, 9 Ill. 2d 390, 137 N.E.2d 849 (1956); Bernatavicius v. Bernatavicius, 259 Mass. 486, 156 N.E. 685 (1927); Coleman v. Coleman, 32 Ohio St. 2d 155, 291 N.E.2d 530 (1972). Thus, as the Supreme Court recognized in *Boddie*, the state's statutory procedures are the only way in which one may terminate a marital relationship.

81. 401 U.S. 371, 377 (1971).

82. *Id.* at 376.

83. 409 U.S. 434 (1973).

84. 410 U.S. 656 (1973).

85. 409 U.S. 434 (1973).

86. 410 U.S. 656 (1973).

87. 409 U.S. 434, 450 (1973); 410 U.S. 656, 656 (1973).

88. 409 U.S. 434, 445 (1973); 410 U.S. 656, 659 (1973). The Court also distinguished *Boddie* on the issue of state monopolization of dispute resolution. The state decreed the sole method of terminating marriage, but theoretically the issues in *Kras* and *Ortwein* could be resolved without reference to a court. 409 U.S. 434, 445 (1973); 410 U.S. 656, 659–60 (1973).

89. See Little v. Streater, 452 U.S. 1, 16 (1981), decided the same day as *Lassiter*, in which the Court quoted the *Boddie* standard.

tunity to be heard.[90] Regarding both the right to counsel and other safeguards, however, the *Boddie* holding apparently is a conclusion that can be reached only by applying tests such as the *Lassiter* analysis.[91] Concerning the right to counsel, the application of the *Lassiter* approach presumably[92] determines whether counsel must be provided to assure a meaningful opportunity to be heard both in a given class of cases and in a particular example of the class. Because of its importance in the *Lassiter* analysis when fundamental rights are at issue, the risk of erroneous determination when a divorce litigant is not represented by counsel determines whether that litigant has been afforded the due process as defined in *Boddie*.[93]

Whatever the present role of the meaningful opportunity to be heard standard, *Boddie* is important to the divorce litigant for another reason. The *Boddie* Court recognized that the right to terminate one's marriage is as fundamental as the right to marry.[94] Despite their apparent differences, both matters affect important individual interests.

In *Lassiter* the Court examined both the importance of the individual interest at issue in the proceeding and the effect of an adverse outcome on that interest.[95] The consequences facing an unsuccessful party in a divorce proceeding differ depending on whether the litigant is the plaintiff or the defendant. A plaintiff will be forced to remain married; conversely, a defendant may be divorced against his or her will.

If the plaintiff is unable to obtain a divorce, the plaintiff's spouse might continue to exhibit behavior constituting a fault ground for divorce.[96] Examples of such behavior include extreme cruelty, gross neglect of duty, and adultery.[97] Under less extreme circumstances, married persons who have no desire to remain together will be forced to do so and thus will have to endure all the attendant unpleasantness of that situation. Furthermore, as the Supreme Court noted in *Boddie*,[98] unless a person is legally divorced he or she cannot remarry.[99]

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90. The New York Court of Appeals has held, however, that an indigent divorce litigant has no constitutional right to counsel. *In re* Smiley, 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975). The court read *Boddie* to require only that the litigant be permitted entry into the judicial process. *Boddie* had considered this precise issue. The *Smiley* court did not consider the principle of a meaningful opportunity to be heard and rationalized its decision in part by asserting that the appropriation of money for appointed counsel is a legislative, not a judicial, function.

91. The Court in Little v. Streater, 452 U.S. 1 (1981), applied the *Eldridge* test to reach a result, then referred to *Boddie* in conclusory fashion.

92. The *Lassiter* Court never mentioned *Boddie*. The Court did, however, apply the more complex *Eldridge*-presumption approach to right to counsel cases, rather than the *Boddie* test.

93. *See infra* subpart III(C).

94. 401 U.S. 371, 376–77 (1971).

95. 452 U.S. 18, 27 (1981).

96. Note, *Justice for the Poor? A Look at the Right to Counsel for Indigents in Divorce Litigation*, 22 N.Y.L. SCH. L. REV. 87, 100 (1976).

97. "The court of common pleas may grant divorces for the following causes: . . . Adultery; . . . Extreme cruelty; . . . Any gross neglect of duty . . . ." OHIO REV. CODE ANN. § 3105.01 (Page 1980). Many states still have fault grounds for divorce. *See* Freed & Foster, *Divorce in the Fifty States: An Overview as of August 1, 1981*, 7 FAM. L. REP. (BNA) 4049, 4051–53 (1981).

98. 401 U.S. 371, 376 (1971).

99. Failure to observe the proscription of remarriage may result in punishment. *See, e.g.*, OHIO REV. CODE ANN. § 2919.01 (Page 1982) (bigamy a first degree misdemeanor).

The effects of an unfavorable holding on the divorce defendant are equally serious. A defendant who wishes to try to keep the marriage intact will be denied that opportunity.[100] A parent could unfairly lose custody of a child, thus raising yet another constitutional concern.[101] An unwanted divorce might impose additional debts upon the indigent defendant through alimony or child support. In addition, a court may unjustly find a defendant guilty under a fault ground, resulting not only in embarassment but quite possibly in criminal liability.[102] The divorce defendant also deserves special consideration because he or she does not initiate the proceedings.[103]

For both the plaintiff and the defendant, an adverse outcome also affects a fundamental individual interest separate from the interest in marriage. The Court in *Eisenstadt v. Baird*[104] recognized that the right of privacy includes "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[105] Because the denial of a divorce to a divorce litigant may inhibit his or her decision to bear a child with another partner, the outcome of divorce litigation clearly may have a substantial impact on this important individual interest.

The *Lassiter* Court accorded great weight to the fundamental interest of a parent in his or her child.[106] The individual's interest in marriage deserves similar consideration in divorce litigation; the matrimonial interest should become a consideration in the *Eldridge* balancing process. The *Lassiter* Court further acknowledged that parental termination hearings have a grave effect on the individual interest at stake.[107] The fundamental interest in marriage may be affected similarly by divorce litigation. In *Lassiter* the Court held that, given the importance of the individual interest at stake, some parental termination defendants would be denied due process if they were denied counsel. Similarly, the significance of and the effect upon the individual interest in the divorce proceeding tips the *Eldridge* balance in favor of at least some divorce litigants.

2. *The State's Interest*

The state's fiscal interest in the proceeding is an element in the *Eldridge* balancing test generally weighing against the person requesting counsel. The state has a substantial interest in supervising the expenditure of public funds

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100. *See* Note, *Indigents' Right to Counsel in Civil Litigation:* Heller *High Water in Ohio*, 12 U. TOL. L. REV. 131, 146–47 (1980).

101. *See infra* text accompanying notes 157–58.

102. *See supra* statutes cited at note 65, which criminalize bigamy. *See also e.g.*, statutes penalizing fornication, IDAHO CODE § 18-6603 (1979); MICH. COMP. LAWS § 750.335 (1968); and adultery, *e.g.*, S.C. CODE ANN. § 16-15-60 (Law. Co-op. 1977); VT. STAT. ANN. tit. 13, § 201 (1974).

103. *See generally* Botein, *Appointed Counsel for the Indigent Civil Defendant: A Constitutional Right Without a Judicial Remedy?*, 36 BROOKLYN L. REV. 368 (1970).

104. 405 U.S. 438 (1972).

105. *Id.* at 453 (emphasis in original).

106. *See supra* text accompanying notes 25–26.

107. 452 U.S. 18, 27 (1981).

and in limiting the use of tax revenues to projects approved by the state legislature. Because of the expense of providing counsel to indigent divorce litigants, the state's fiscal interest favors witholding counsel. Nonetheless, some state interests support the litigant's right to counsel. All states have enacted grounds for granting and procedures for obtaining divorce. States therefore are interested in an accurate determination to uphold the integrity of their divorce mechanisms. Counsel may be necessary to ensure such a determination, thus a state may favor provision of counsel.

Divorce on a proper showing of fault is a procedure entrenched in American law. Most states also have enacted "no-fault" divorce legislation.[108] These statutes evidence a public policy favoring legal termination of marriages that functionally are dead by granting divorce on the agreement of the parties or on such grounds as "irretrievable breakdown."[109] Because no state denies divorce,[110] each jurisdiction's statutory grounds of divorce constitute legislative condemnation of those situations within the marital relationship that are against public policy.[111] That policy is frustrated to the extent that a person is trapped (because of a lack of sufficient funds to hire counsel) in circumstances that would constitute a ground for divorce. The state, therefore, shares the individual's interest in a correct determination, an interest that is furthered by participation of counsel.[112]

As a primary justification for their refusal to provide counsel to indigent litigants, states often point to the excessive administrative cost required.[113] Recent federal and state budgetary difficulties substantiate this concern. Methods other than state-funded counsel exist, but mechanisms such as Legal Aid and uncompensated representation by local attorneys are insufficient to render assistance to everyone who needs a divorce attorney.[114] Although recognizing the state's fiscal interest, the *Lassiter* Court found that, at least when the risk of erroneous determination was high, protection of the funda-

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108. *See* Freed & Foster, *Divorce in the Fifty States: An Overview as of August 1, 1981*, 7 FAM. L. REP. (BNA) 4049, 4051 (1981).

109. A common form of no fault legislation is "a general category of laws which require . . . proof of 'irretrievable breakdown,' 'irreconcilable differences,' or some similarly phrased condition which presumably denotes that the marriage is dead." W. WADLINGTON & M. PAULSEN, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS 390 (3d ed. 1978).

110. *See* Freed & Foster, *Divorce in the Fifty States: An Overview as of August 1, 1981*, 7 FAM. L. REP. (BNA) 4049, 4051–52 (1982).

111. *See, e.g.*, Otis v. Bahan, 209 La. 1082, 26 So. 2d 146 (1946); Hamm v. Hamm, 30 Tenn. App. 122, 204 S.W.2d 113 (1947).

112. The presence of counsel could be counterproductive, however, in a hearing intended to be informal and nonadversarial. *See* Lassiter v. Department of Social Servs., 452 U.S. 18, 47 (1981) (Blackmun, J., dissenting).

113. *See* Lassiter v. Department of Social Servs., 452 U.S. 18, 28 (1981); Davis v. Page, 640 F.2d 599, 603 (5th Cir. 1981); Reist v. Bay Circuit Judge, 396 Mich. 326, 351–52, 241 N.W.2d 55, 66 (1976); Crist v. Division of Youth and Family Servs., 128 N.J. Super. 402, 416–17, 320 A.2d 203, 211 (Super. Ct. Law Div. 1974), *modified*, 135 N.J. Super. 573, 343 A.2d 815 (Super. Ct. App. Div. 1975); Note, *Indigents' Right to Counsel in Civil Litigation:* Heller *High Water in Ohio*, 12 U. TOL. L. REV. 131, 146–47 (1980); Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 551–52 (1967).

114. Comment, *Right to Assigned Counsel in Divorce Actions and the Effects of* Matter of Smiley: *Setting the Boundaries in a New Frontier*, 40 ALB. L. REV. 513, 535–37 (1976); Comment, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1323–25 (1966).

mental parent-child relationship justified an increase in the state's fiscal outlay.[115] Before it applied the presumption against counsel, the Court downplayed the state's cost interest, terming it "hardly significant."[116] The state's cost interest is more weighty in divorce actions than parental termination hearings because divorce cases arise in greater numbers, making provision of counsel more costly to the state.[117]

A state that declines to provide counsel also might assert its interest in the relative allocation of legal resources to support its position.[118] Although many persons need legal services, only a limited pool of attorneys exist, and fairness to all litigants demands that court dockets be kept to a reasonable length. Moreover, not every dispute is so important to the persons concerned that reference to legal machinery is necessary. The high cost of legal representation encourages the parties to resolve their minor disputes without going to court.

When added to the *Eldridge* balancing test, the *Lassiter* presumption requires the petitioner to make a stronger showing of his or her need for representation to justify provision of counsel. In effect, this increased burden gives greater weight to the state's economic interest. As a result, the *Lassiter* Court held that in parental termination hearings as a class the fundamental individual interest is insufficient to overcome both the state's fiscal interest and interest in informal proceedings.[119] The Court went on to say, however, that an individual interest might be strong enough in some cases to outweigh the state's interest; thus a case-by-case determination of the necessity of counsel must be made.[120] In *Lassiter* the effect of the presumption against counsel precluded an absolute right to counsel despite the presence of a fundamental individual interest. The risk of erroneous determination, because it differs widely among parental termination cases, distinguishes particular cases requiring counsel from those that do not.[121]

If the Court extended the *Lassiter* rationale to divorce proceedings, it clearly would not declare an absolute right to counsel in divorce litigation. Although an important individual interest deserving protection is at stake, *Lassiter* also concerned a similar interest, and there the Court found that no absolute right to counsel existed. Moreover, because the state's cost interest is greater in divorce cases than in parental termination hearings, a decision in favor of all indigent divorce litigants is unlikely. Despite the greater cost of

115. 452 U.S. 18, 28 (1981). *But see infra* note 118 and accompanying text.

116. 452 U.S. 18, 31 (1981).

117. There were 1,181,000 divorces granted in the United States in 1979. 7 FAM. L. REP. (BNA) 2589 (1981). It is unclear how many divorce litigants would warrant appointed counsel, but such litigants are surely more numerous than those parental termination defendants who would be entitled to representation under *Lassiter*.

118. *See* McAninch, *A Constitutional Right to Counsel for Divorce Litigants*, 14 J. FAM. L. 509, 511 (1975–76).

119. 452 U.S. 18, 31 (1981).

120. *See supra* text accompanying notes 33–34.

121. 452 U.S. 18, 32–33 (1981).

counsel in divorce litigation, presence of counsel assists in the protection of a fundamental interest. Consequently, a case-by-case approach like that applied in *Lassiter* also would be appropriate in the divorce situation. Again, the determination of the risk of erroneous outcome is the key element in a court's attempt to apply the *Eldridge* analysis to draw a distinction among various divorce cases.[122] This Case Comment now will examine that element.

3. *The Risk of Erroneous Determination*

The third prong of the *Lassiter* test requires the court to measure the risk of erroneous determination in the hearing. The following two factors contribute to the possibility of error: First, the general difficulties that a lay person faces in a court of law; and second, the particular difficulties that a litigant encounters in divorce litigation. In addition, a particular case might present circumstances making self-representation unusually problematical. This last issue is crucial in determining which divorce cases merit the appointment of counsel.

To obtain a divorce, a person must follow a formal court procedure. Divorce cannot be obtained by mutual consent alone or by an extra-judicial process.[123] Therefore, a lay person seeking divorce faces problems common to any litigant who resorts to using the judicial system. A litigant in a civil case must prepare pleadings, recognize and investigate relevant evidence, present this evidence in an admissible way, make an argument based on correct legal theory, and avoid procedural pitfalls, such as failure to file motions within the requisite time periods.[124] Competent legal advice will reduce the risk of erroneous result.

The obstacles confronted by a *pro se* litigant in civil litigation are products of the adversary system of dispute resolution.[125] The particular fact finder functions not as a mediator attempting to reach an understanding between the parties, but as an arbitrator deciding which party has presented the superior case. The trier of fact has no independent responsibility to investigate the allegations and so must rely on competent evidence adduced by the parties. Use of the adversary system increases the importance of judicial precedent and legal rules and standards derived from other sources. American judicial process frowns on ad hoc decision-making, but precedent and legal doctrines generate great confusion for uncounseled litigants. This confusion increases the risk of erroneous determinations.

The Supreme Court has been cognizant of these concerns. In *Powell v. Alabama*[126] the Court held that a criminal defendant facing capital punish-

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122. *See, e.g., infra* text accompanying notes 159–60.

123. Boddie v. Connecticut, 401 U.S. 371, 376 (1971).

124. Comment, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1331 (1966); Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 548 (1967).

125. Comment, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1331–32 (1966).

126. 287 U.S. 45 (1932).

ment has the right to counsel. The Court's opinion in *Powell* contains an eloquent statement of the vital role of legal representation in a judicial proceeding.[127] The Court reaffirmed its sympathy to this concern in *Gideon v. Wainwright*[128] by further holding that an indigent litigant in a criminal trial has a fundamental right to assistance of counsel. The Court also has noted the inequity of pitting an uncounseled litigant against a trained legal professional.[129]

Of course, these cases concerned at least the possible loss of physical liberty, while divorce ligitation does not. The Court held that, because of the potentially grievous consequences under such circumstances, counsel was necessary to reduce the risk of erroneous determination. As the *Lassiter* presumption demonstrates,[130] however, the Court probably would consider as less serious the consequences of an inaccurate outcome in a divorce case. The risk of an erroneous determination, as distinguished from the result, is similar any time a civil or criminal litigant proceeds *pro se*. The problems discussed by the Court in *Powell* and *Gideon* are inherent in all judicial proceedings and remain relevant even when the physical liberty of the litigant is not in jeopardy.

The foregoing concerns are common to all civil and criminal litigation; however some cases illustrate more clearly the need for counsel than others. The particular problems presented by matrimonial litigation must be examined to determine if the absence of counsel increases the risk of an erroneous decision in a divorce action. Ohio's statutory scheme is typical of divorce procedures:[131] it provides for divorce on no-fault (dissolution)[132] and fault[133] grounds and for annulment.[134]

A no-fault divorce presents the least difficulty for a *pro se* litigant.[135] The

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127. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true it is of the ignorant and illiterate, or those of feeble intellect.

Id. at 68–69.

128. 372 U.S. 335 (1963). "[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344.

129. Railroad Trainmen v. Virginia Bar, 377 U.S. 1, 3–4 (1964).

130. *See supra* subpart III(A).

131. *See* Freed & Foster, *Divorce in the Fifty States: An Overview as of August 1, 1981*, 7 FAM. L. REP. (BNA) 4049, 4051–53 (1981).

132. OHIO REV. CODE ANN. § 3105.61 (Page 1980).

133. *Id.* § 3105.01.

134. *Id.* § 3105.31.

135. *See generally* McAninch, *A Constitutional Right to Counsel for Divorce Litigants*, 14 J. FAM. L. 509, 517–20 (1975–76).

Ohio dissolution procedure[136] requires that both spouses file a petition in the court of common pleas.[137] The petition must be accompanied by a separation agreement, signed by both parties, containing provisions for property division, alimony, custody, child support, and visitation.[138] The spouses then must make a personal appearance before the court, which reviews the separation agreement.[139] If the court finds the agreement acceptable, it will grant the dissolution.[140]

Of course, this simplified method is available only if both parties agree to a separation and its terms.[141] Even if the spouses agree to separate, counsel may be necessary to explain the implications and equities of the separation agreement.[142] Another Ohio statutory no-fault provision[143] allows divorce if the spouses have "without interruption for one year, lived separate and apart without cohabitation." Whether a divorce will be granted under this statute turns on factual questions that require proper pleading and proof.

Statutes in other jurisdictions authorize divorce on additional no-fault grounds, such as incompatibility,[144] irreconcilable differences or irremediable breakdown,[145] and insanity.[146] Certain facts must be presented to prove existence of these grounds. A party can ascertain the facts needed to sustain a no-fault finding only by examining the law of the jurisdiction, a task best suited to a lawyer.

To obtain a divorce on fault grounds in Ohio, the plaintiff must prove one of the circumstances delineated in Ohio Revised Code section 3105.01.[147] The statute permits divorce for bigamy, willful absence of the adverse party for one year, adultery, impotence, extreme cruelty, fraud, gross neglect of duty,

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136. OHIO REV. CODE ANN. §§ 3105.61–.65 (Page 1980).

137. *Id.* § 3105.63.

138. *Id.*

139. *Id.* § 3105.64:

Not less than thirty nor more than ninety days after the filing of a petition for dissolution of marriage, both spouses shall appear before the court and each spouse shall acknowledge under oath that he has voluntarily entered into the separation agreement appended to the petition, that he is satisfied with its terms, and that he seeks dissolution of the marriage.

140. *Id.* § 3105.65:

(A) If at the time of the hearing either spouse is not satisfied with the separation agreement, or does not wish a dissolution of the marriage, the court shall dismiss the petition and refuse to validate the proposed separation agreement.

(B) If, upon review of the testimony of both spouses, and of the report of the investigator pursuant to the Civil Rules, the Court approves the separation agreement and any amendments thereto agreed upon by the parties, it shall grant a decree of dissolution of marriage incorporating the separation agreement.

141. *Id.* § 3105.65(A).

142. Going through a divorce causes a great deal of emotional stress, creating still more difficulty for rational decision-making for both parties. *See* McAninch, *A Constitutional Right to Counsel for Divorce Litigants*, 14 J. FAM. L. 509, 520 (1975–76).

143. 1982 Ohio Legis. Bull. 468 (Anderson).

144. *See, e.g.*, KAN. STAT. ANN. § 60–1601(8) (1976); N.M. STAT. ANN. § 40-4-1(A) (1978); OKLA. STAT. tit. 12, § 1271 (1961).

145. *See, e.g.*, FLA. STAT. § 61.052(1)(a) (Supp. 1982); KY. REV. STAT. § 403.025 (Supp. 1980); WASH. REV. CODE § 26.09.030 (Supp. 1982).

146. *See, e.g.*, CONN. GEN. STAT. § 46b-40(c)(10) (Supp. 1982); OKLA. STAT. tit. 12, § 1271 (1961).

147. OHIO REV. CODE ANN. § 3105.01 (Page 1980).

habitual drunkenness, imprisonment of the adverse party, and procurement of out-of-state divorce. Each ground raises factual questions, some of which are relatively straightforward. Nonetheless, competent evidence is required to prove any of the grounds. Furthermore, the terms "extreme cruelty" and "gross neglect of duty," for instance, are vague, and their meaning is clarified only by common law. In these circumstances a meritorious divorce action may be dismissed if the plaintiff fails to frame the complaint properly.[148] Various defenses to similar fault grounds for divorce exist in all jurisdictions. For example, the defendant may plead collusion,[149] procurement,[150] insanity,[151] or recrimination and condonation.[152] These defenses raise the possibility that uncounseled plaintiffs will prejudice their cases by introducing facts proving a defense and that similarly positioned defendants will be unable to prove an available defense.[153]

Marriages also may be terminated in Ohio by annulment. Ohio Revised Code section 3105.31[154] requires proof of specific grounds. Factual issues raised by claims of bigamy and nonage increase the need for counsel in an adversarial context.[155] Defenses to annulment,[156] because of their complexity, can act both as traps for unwary plaintiffs and missed opportunities for defendants.

Issues other than the legal standards for termination of a marriage arise in divorce litigation. Property settlements and alimony awards divide the spouses' present and future economic resources. In many cases counsel is necessary to protect the interests of a party during the determination and distribution of alimony and property. If the litigants have minor children, provision for child support presents an additional resource allocation problem. Judicial decision-making regarding child support affects the economic interests of both the litigants and their children.

The presence of minor children also raises the question of which parent will be given custody. Effective argument under the prevailing "best interests of the child" standard[157] may be impossible without representation by counsel. The custody test is vague and highly subjective making the assistance of

148. McAninch, *A Constitutional Right to Counsel for Divorce Litigants*, 14 J. FAM. L. 509, 520–21 (1975–76).

149. *See, e.g.*, ILL. REV. STAT. ch. 40, § 408 (1980); PA. STAT. ANN. tit. 23, § 207(a) (Purdon Supp. 1982).

150. *See, e.g.*, Gutzwiller v. Gutzwiller, 8 N.J. Super. 254, 74 A.2d 325 (N.J. Super. Ct. App. Div. 1950); PA. STAT. ANN. tit. 23, § 207(a) (Purdon Supp. 1982).

151. *See, e.g.*, Nelson v. Nelson, 108 Ohio App. 365, 154 N.E.2d 653 (1958).

152. *See, e.g.*, Neff v. Neff, 13 Md. App. 128, 281 A.2d 556 (1971) (condonation); Chastain v. Chastain, 559 S.W.2d 993 (Tenn. 1977); Wimbrow v. Wimbrow, 208 Va. 141, 156 S.E.2d (1967) (recrimination); TEX. FAM. CODE ANN. § 3.08(b) (Vernon 1975). Many states have abolished traditional defenses. *See* Freed & Foster, *Divorce in the Fifty States: An Overview as of August 1, 1981*, 7 FAM. L. REP. (BNA) 4049, 4053–54 (1981). Ohio is one of these states. OHIO REV. CODE ANN. § 3105.10(C) (Page 1980).

153. McAninch, *A Constitutional Right to Counsel for Divorce Litigants*, 14 J. FAM. L. 509, 521 (1975–76).

154. OHIO REV. CODE ANN. § 3105.31 (Page 1980).

155. *See* Note, *Justice for the Poor? A Look at the Right to Counsel for Indigents in Divorce Litigation*, 22 N.Y.L. SCH. L. REV. 87, 100–01 (1976).

156. *See, e.g.*, the "Enoch Arden" presumption of death, OHIO REV. CODE ANN. § 2121.01 (Page 1976).

157. *See, e.g.*, OHIO REV. CODE ANN. § 3109.04(A) (Page 1982).

counsel necessary to present the appropriate facts. A lack of legal sophistication by a *pro se* party may jeopardize the fundamental parent-child relationship.[158]

The foregoing matters may contribute to the risk of erroneous determination in divorce cases. The complexities arise out of the nature of matrimonial litigation. Each divorce case is different and will contain different combinations of the procedural and substantive issues discussed above. When the trial judge applies the *Lassiter* test to a particular case, he must ascertain which issues are present and the likelihood that their existence will be too much for an uncounseled litigant to handle.

In its assessment of the risk of erroneous determination in *Lassiter*, the Supreme Court examined the facts of the case to determine whether troublesome substantive or procedural issues were present. After concluding that none existed, the majority considered the characteristics of the particular litigant, Ms. Lassiter.[159] Similarly, in the divorce context, the trial judge must determine whether the indigent litigant possesses any characteristics that would make him or her more or less able to go forward *pro se*. Of prime relevance to this inquiry are the litigant's education and articulateness.

Under the *Lassiter* balancing test the trial judge has great discretion in deciding whether a particular case requires provision of counsel. Even though the judge must consider the full panoply of facts presented in the case, he has wide latitude regarding the weight that he gives each fact. The *Lassiter* Court held that counsel was unnecessary to afford Ms. Lassiter due process because the presence of a lawyer would not have made a "determinative difference"[160] to the outcome of her case. The evidence was so unfavorable to Ms. Lassiter that she would have lost even if she had been provided counsel. Therefore, the trial judge in a divorce action must decide whether the entire factual ambiance of the case indicates that the indigent litigant simply could not prevail or, conversely, could not be defeated, even if the litigant was represented by counsel.

IV. CONCLUSION

The clear import of the *Lassiter* rationale, when extended to the divorce context, is that some divorce litigants have the constitutional right to counsel. Fundamental rights are at stake in both divorce and parental termination hearings.[161] Because of the similar interests concerned, the *Lassiter* holding mandating the provision of counsel on a case-by-case basis in parental termination cases is directly applicable to divorce proceedings. Under the first step of its analysis the *Lassiter* Court held that parental termination defend-

158. *See supra* cases cited in note 69. *See also* Note, *Justice for the Poor? A Look at the Right to Counsel for Indigents in Divorce Litigation*, 22 N.Y.L. SCH. L. REV. 87, 100 (1976).

159. *See supra* text accompanying notes 35–37.

160. *Id.*

161. *See supra* text accompanying notes 67–94.

ants do not have an absolute right to counsel; therefore it is unlikely that all divorce litigants would have this right. The individual interests are similar in the two proceedings, but the state's interest in withholding counsel is greater in the divorce situation.[162]

If due process requires provision of counsel to some, but not all, divorce litigants, the court will have to draw what often are subtle distinctions among the various divorce cases. This line-drawing process is the second step of the *Lassiter* analysis. The *Lassiter* Court indicated that the trial judge must apply the *Lassiter* analysis to the particular facts of each case to decide whether counsel is necessary.[163] Similarly, the trial court should examine the particular legal issues and facts of an indigent divorce litigant's case. Under this approach, if all evidence is relevant, the judge should rule in favor of providing counsel unless the presence of a lawyer for the indigent litigant clearly will not affect the outcome of the case.

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162. *See supra* text accompanying notes 113–17.
163. 452 U.S. 18, 31–32 (1981).

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